ment.[8] It should be noted, in this connection, that an allegation that money is due and owing, although a conclusion of law, is one in which a material fact is implied, and theoretically should be taken advantage of by special demurrer.[9]

In the case of *Poetker v. Lowry*,[10] the complaint contained an allegation "that the defendant has refused and still refuses to pay" the note. A general demurrer to the complaint was overruled, and, after trial and judgment for the plaintiff, the judgment was reversed on the ground that there was no allegation of non-payment. It is submitted that the decision is incorrect and in direct conflict with the case of Bliss v. Sneath,[11] in which an allegation in the same words was held sufficient against a general demurrer. Although the averment in question is not a conclusion of law in which a material fact is directly inferable,[12] it is at least a defective statement of the essential fact of non-payment, and vulnerable only to a special demurrer.[13] Averments that the defendant "has failed, neglected and refused",[14] or has "neglected and refused" to pay have been held good in the absence of special demurrer.[15] In such cases there is a defective and improper statement of material facts, not an entire absence of necessary allegations.[16]

In the principal case we have, at best, a reversal on a mistaken technicality, since the defense interposed by the defendant was lacking in merit. Even if the decision were technically correct it could scarcely be sustained upon a liberal view of the code system. It is to be hoped that the recent amendment to section four and one-half of article four of the constitution,[17] relating to the miscarriage of justice in civil actions, will in the future avoid the necessity of such technical decisions and their inevitable mistakes.

A. A.

PUBLIC LAND LAW: JURISDICTION OF LAND DEPARTMENT.—The accepted rule in this country is that the courts cannot exercise any direct appellate jurisdiction over the rulings of the officers of the Land Department. There is one exception to this rule, jurisdiction in questions of law, which Judge Lindley[1] in his book

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[8] Knox v. Buckman Contracting Co., supra, note 6; Wells, Fargo & Co. v. McCarthy (1907), 5 Cal. App. 301, 308, 90 Pac. 203.

[9] Burke v. Dittus (1908), 8 Cal. App. 175, 178, 96 Pac. 330.

[10] (Oct. 22, 1914), 19 Cal. App. Dec. 523.

[11] (1894), 103 Cal. 43, 36 Pac. 1029.

[12] Stewart v. Burbridge, supra, note 4.

[13] Grant v. Sheerin (1890), 84 Cal. 197, 199, 23 Pac. 1094; Scroufe v. Clay (1886), 71 Cal. 123, 11 Pac. 882.

[14] O'Hanlon v. Denvir (1889), 81 Cal. 60, 22 Pac. 407.

[15] Rankin v. Sisters of Mercy (1889), 82 Cal. 88, 22 Pac. 1134; Gardner v. Donnelly (1890), 86 Cal. 367, 24 Pac. 1072; Irwin v. Insurance Co. (1911), 16 Cal. App. 143, 116 Pac. 294.

[16] Richards v. Travelers' Ins. Co. (1889), 80 Cal. 505, 507, 22 Pac. 939.

[17] Senate Const. Amend. 12, Amendments and Proposed Statutes, Nov., 1914, p. 3.

[1] Lindley on Mines, 3rd ed., § 666.

on mines expresses as follows: "They [the courts] have a right to investigate rulings made by the department, a right which in the absence of fraud or imposition does not exist where only questions of fact are involved." An illustration of this principle is to be found in the case of *Sanders v. Dutcher*,[2] where the California Supreme Court reversed the findings of the United States Land Department recognizing defendant's homestead entry, and granted relief to plaintiff whose claim was based on a Desert Land entry.

On first appeal the commissioner had rejected the plaintiff's Desert Land claim on the grounds that she had not personally done the work required, and that she had contracted to sell the claim before she had made the final proofs. The mistake as to the first ground is self-evident. The second is a clear mistake of law, as there is no legal principle which forbids such a contract or which declares the title received thereunder invalid. A contract to sell land before title vests is against the policy of the law only in those cases where such policy is specifically declared by the law. It is so stated in the Homestead Act and the land officer was apparently laboring under the misapprehension that the provisions of that act applied here. The court reversed the officer's decision and made the plaintiff in this case the trustee for the defendant, and directed that any title obtained by the plaintiff should be conveyed to the defendant.

If the general rule as to Land Office appeals be strictly construed, the plaintiff would have no remedy. To supply this very need it is now settled that in this class of cases there exists in the courts of equity,[3] both state and federal, the jurisdiction to correct mistakes and relieve against frauds and impositions. The usual remedy for mere errors in judgment upon the weight of evidence in a contested case before the commission, is appeal from one officer to another of the department with a last resort to the President.[4] Remembering that in dealing with the public domain Congress decides upon private rights of great value, and that these dealings are ex parte and peculiarly liable to the influence of frauds, false swearing and mistake, justice demands that the courts give a remedy. There is no reason why the actions of the Land Department should not be subject in these cases to a court of equity, which since its creation has had the power to

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[2] (Sept. 30, 1914), 48 Cal. Dec. 213.

[3] Baldwin v. Starks (1882), 107 U. S. 463, 27 L. Ed. 526, 2 Sup. Ct. Rep. 473; Gage v. Gunther (1902), 136 Cal. 338, 68 Pac. 710; Moore v. Robins (1877), 96 U. S. 530, 24 L. Ed. 848; Shepley v. Cowan (1875), 91 U. S. 330, 23 L. Ed. 424.

[4] Powers conferred on the officers of the Interior Department by U. S. Rev. Stat., § 453; Pengra v. Munz (1887), 29 Fed. 830; Whitcomb v. White (1909), 214 U. S. 15, 53 L. Ed. 889, 29 Sup. Ct. Rep. 599; De Cambra v. Rogers (1903), 189 U. S. 119, 47 L. Ed. 734, 23 Sup. Ct. Rep. 519.

inquire into and correct mistakes, injustice and wrongs in both the judicial and the executive departments.

This case is especially interesting in view of the recent attempts to secure congressional action establishing a Court of Land Appeals. The Department of the Interior has recognized this need by securing provision in the Sundry Civil Appropriation Bill for the salaries of certain law officers who are to assist the Secretary of the Interior in deciding important questions of law. This is a step in the right direction as there exists a crying need for a court of last appeal for the Land Department.

The inconsistent rulings of the Land Department point to the desirability of securing certainty in decisions by substituting a permanent court of lawyers in the place of administrative officers who are forced to depend on administrative law clerks.

L. G.

SALES: CONDITIONAL SALES: LOSS ON SELLER.—The question as to whether the loss due to the destruction of goods during the existence of an agreement of conditional sale should fall upon the seller or the buyer has often been presented to the courts. In such agreements it is expressly provided that the title to the goods shall remain in the vendor until payment of the full price by the vendee, but the vendee is given the possession and use of the goods in the meantime. The authorities are in conflict on the question of responsibility for loss but the majority view places the loss upon the conditional buyer.[1]

The question apparently has never been decided by the courts of appeal in California before the case of *Waltz v. Silviera.*[2] In this case the court decided that the loss should fall upon the seller. The court did not discuss the matter at length nor refer to any previous decision upon the point in this jurisdiction. The opinion was based on the rule that risk follows title. That is the rule in case of ordinary sales and contracts to sell; the risk there follows the property.[3] The situation is different in the case of conditional sales since the seller retains title merely to secure payment of the price. The reasons for holding that the loss should fall upon the buyer rather than the seller have been suggested by many cases which are ably discussed by a learned author in his treatise on sales.[4] The Uniform Sales Act puts the loss upon the buyer. It is hard to see why this court in passing upon a question, apparently for the first time, should fix the law of this state contrary to the

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[1] Chicago Ry. Equipment Co. v. Merchants' Bank (1890), 136 U. S. 268, 34 L. Ed. 349, 10 Sup. Ct. Rep. 999; Phillips v. Hollenberg Music Co. (1907), 82 Ark. 9, 99 S. W. 1105; Tufts v. Griffin (1890), 107 N. C. 47, 12 S. E. 68, 10 L. R. A. 526, 22 Am. St. Rep. 863; Williston on Sales, § 304.

[2] (Nov. 9, 1914), 19 Cal. App. Dec. 598.

[3] Potts Drug Co. v. Benedict (1909), 156 Cal. 322, 324, 104 Pac. 432.

[4] Williston on Sales, §§ 304, 330, 331, 334, 571.